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PD-1092-20
In the Court of Criminal Appeals of Texas
At Austin

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No. 01-19-00100-CR
In the Court of Appeals
For the First District of Texas
At Houston

———♦———

No. 1620108
In the 177th District Court
Of Harris County, Texas

———♦———

***Ex parte* Maurice Edwards**
Appellant

———♦———

State's Brief on Discretionary Review

———♦———

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Statement of the Case

The appellant was indicted for aggravated sexual assault. (2 RR 7). He applied for pretrial habeas relief based on the statute of limitations. (CR 4). The trial court denied relief. (CR 11).

The First Court of Appeals reversed and ordered the charge dismissed. The State filed a motion for en banc reconsideration, which the panel treated as a motion for rehearing and issued a new, published opinion, again reversing the trial court and ordering the trial court to grant habeas relief. *Ex parte Edwards*, 608 S.W.3d 325 (Tex. App.—Houston [1st Dist.] 2020, pet. granted.). The State filed a motion for rehearing from that opinion, which the panel denied.

Grounds for Review

1. The First Court erred by holding that a shotgun objection and a complaint about another part of the statute preserved the appellant's appellate argument. This conflicts with this Court's holding in *Resendez*.

2. The First Court erred by holding that the State had to admit DNA test results at a pretrial habeas hearing challenging the validity of the charging instrument.

3. This limitations claim is not cognizable on pretrial habeas because it is a fact-intensive non-constitutional defense. The appellant has an adequate remedy at law through a motion to quash.

Statement of Facts

In 2003 the complainant told police she was sexually assaulted by a man named Maurice. (2 RR 14). The complainant was taken to a hospital where a sexual assault kit was done. (2 RR 15). Based on information from the complainant, police identified the appellant as a suspect. (2 RR 15). Police did not find the complainant credible and the investigation was closed soon after when the complainant stopped communicating with police. (2 RR 15, 17).

The sexual assault kit was tested for DNA in 2013, and the next year a CODIS hit came back to the appellant. (2 RR 23-25). The appellant was indicted in 2017. (2 RR 5).

Procedural Background

On original application, the appellant argued a code provision that exempts sexual assault from the statute of limitations did not apply to this case because his identity was "readily ascertained" at the time of the offense. The trial court disagreed and denied relief.

The appellant applied for a pretrial writ of habeas corpus, asking the habeas court to dismiss the indictment "because the statute of limitations bars prosecution for the alleged May, 2003 offense, in violation of the Sixth Amendment to the United States Constitution, Article I sec.

10 of the Texas Constitution, and Article 12.01 of the Texas Code of Criminal Procedure." (CR 4-5).

The trial court held a hearing, where the appellant did not mention any constitutional claims but based his argument entirely on Code of Criminal Procedure Article 12.01. (1 RR 7, 18-25). Though it has since been amended in ways that do not affect this case, at the time that article provided a ten-year statute of limitations for sexual assault, except there was no statute of limitations if:

> during the investigation of the offense biological matter is collected and subjected to forensic DNA testing and the testing results show that the matter does not match the victim or any other person whose identity is readily ascertained.

Act of April 20, 2001, 77th Leg., R.S., ch. 12, 2001 Tex. Gen. Laws 20 (amended 2019) (current version at TEX. CODE CRIM. PROC. art. 12.01(1)(C)).

The only legal question the parties discussed was whether the appellant's identity had been "readily ascertained" at the time of the investigation. (1 RR 20 (habeas court asking if defense's counsel's argument was "we knew who he was," and defense counsel replying: "That's a hundred percent my argument.")). Defense counsel cited the habeas

court to cases on that exact issue. (1 RR 20) (discussing *Ex parte Montgomery*, No. 14-17-00025-CR, 2017 WL 3271088 (Tex. App.—Houston [14th Dist.] August 1, 2017, pet ref'd) (not designated for publication) and *Ex parte Lovings*, 480 S.W.3d 106 (Tex. App.—Houston [14th Dist. 2015, no pet.)).

In its ruling, the trial court said it was denying relief because it did not believe the appellant's identity was readily ascertained at the time of the investigation. (1 RR 25).

In the First Court, the appellant argued the State failed to meet its burden of proof at the habeas hearing because it did not introduce DNA test results. The First Court agreed and reversed.

On direct appeal, the appellant argued the State was required to admit the actual DNA testing results at the habeas hearing, and its failure to do so meant the 12.01(1)(C) exemption from the statute of limitations did not apply. (Appellant's Brief at 11-13, 15). The State responded that this argument was unpreserved, and the multiple references to DNA testing and CODIS hits in the record carried whatever burden the State had to show biological material was "collected and subjected to forensic DNA testing." (State's Brief at 11-21).

The First Court held that the appellant preserved his argument with the shotgun objection in his application, and by stating at the hearing his "core position" was that "the ten-year statute of limitations d[id] apply." *Ex parte Edwards*, 608 S.W.3d at 333-34. The First Court also held that evidence police ran the DNA recovered from the complainant through CODIS was insufficient to show, as Article 12.01(1)(C) requires, that "forensic DNA testing results showed that the matter did not match the victim or any other person whose identity was readily ascertained." *Id.* at 336-37. Citing a definition from an unrelated section of the Government Code, the First Court held the State was "statutorily required" to admit the actual DNA test results at the hearing. *Id.* at 336. (citing TEX. GOV'T CODE § 411.141(7)). The First Court reversed and ordered the habeas court to grant relief. *Id.* at 337.

A Note on Ordering

In its petition for discretionary review, the State's first ground regarded perseveration. The State listed this ground first because the First Court's preservation holding is the most obviously incorrect part of its opinion.

However, the State's third ground regards cognizability. Although not raised below, this is a threshold inquiry that can be raised at any time.

Because this Court has granted review of this threshold inquiry, the State will present its third ground first.

Ground Three

This limitations claim is not cognizable on pretrial habeas because it requires going beyond the face of the charging instrument.

For a pretrial habeas appeal, there's an awful lot of factual discussions in the record and in the First Court's opinion. Although historically this Court has allowed defendants to raise limitations claims through pretrial habeas, the limitations scheme the Legislature has adopted for sexual assault means the defense requires factual development that is not appropriate for a pretrial writ.

The State asks this Court to hold that absent an *ex post facto* claim, an indictment for sexual assault or aggravated sexual assault will never be time barred based on the face of the indictment, so a limitations defense should be litigated through a motion to quash or to the jury.

There have been several recent appellate opinions litigating defendants' pretrial writs about the Article 12.01(1)(C) exemption. *See, e.g.*, *Ex parte Campozano*, 610 S.W.3d 572 (Tex. App.—Dallas 2020, pet. ref'd); *Ex parte Lovings*, 480 S.W.3d (106 (Tex. App.—Houston [14th Dist.] 2015, no pet.); *Ex parte Montgomery*, No. 14-17-00025-CR, 2017 WL 3271088 (Tex. App.—Houston [14th Dist.] Aug. 1, 2017, pet. ref'd (not designated for publication).

These cases, along with this case, have two things in common: 1) They're fact intensive; 2) They never question whether this sort of fact-intensive non-constitutional claim is cognizable on pretrial habeas.

But cognizability "is a threshold issue that should be addressed before the merits of the claim may be resolved." *Ex parte Ellis*, 309 S.W.3d 71, 79 (Tex. Crim. App. 2010). Texas law disfavors pretrial habeas applications because they entitle defendants to interlocutory appeals that disrupt trial proceedings. *Ex parte Smith*, 178 S.W.3d 797, 801-02 (Tex. Crim. App. 2005).

A writ of habeas corpus is not an appropriate remedy if a defendant has an adequate remedy by law. *Headrick v. State*, 988 S.W.2d 226, 228 (Tex. Crim. App. 1999) (holding claim of non-constitutional collateral estoppel not cognizable on pretrial writ because defendant could

raise claim on direct appeal); *see Ex parte Weise*, 55 S.W.3d 617, 620 (Tex. Crim. App. 2001) (listing claims that are not cognizable on pretrial writ because they require factual development, including speedy trial and suppression issues).

A defendant may use pretrial writs to challenge: 1) "the State's power to restrain him at all"; 2) "the manner of his pretrial restraint"; and 3) "certain issues which, if meritorious, would bar prosecution or conviction." *Smith*, 178 S.W.3d at 801.

To whatever degree it is cognizable, a limitations defense falls in the third category. But what is the theory under which a limitations claim can be a bar on prosecution?

In decades past, this Court allowed defendants to raise limitations claims on pretrial writs on the theory that if the face of an indictment showed a prosecution was barred by limitations, the indictment was "fundamentally defective" and did not confer jurisdiction on the trial court. *Ex parte Dickerson*, 549 S.W.2d 202, 203 (Tex. Crim. App. 1977). As *Dickerson* pointed out, Article 21.02 requires an indictment to allege a date "not so remote that the prosecution of the offense is barred by limitation." TEX. CODE CRIM. PROC. art. 21.02(6).

At the time of *Dickerson*, this Court's precedent held that an indictment that did not meet statutory requirements was fundamentally defective and did not vest the trial court with jurisdiction. Such a complaint could be raised at any time, either by the defendant or by this Court. For instance, *Dickerson* was actually a bail appeal. *Dickerson*, 549 S.W.2d at 203. But this Court "took cognizance of a matter of fundamental nature"—namely that the charged appeared to time barred. *Ibid.* It did so without the lower court or even the parties addressing the matter. It must have been bewildering for the parties to litigate a bail claim only to have this Court dismiss the case.

Such a result would be practically impossible today because the 1985 constitutional amendments defined an indictment as a written instrument from a grand jury that charged a person with an offense. *See Ex parte Doster*, 303 S.W.3d 720, 724 (Tex. Crim. App. 2010) (noting that 1985 amendments "undercut" rationale of *Dickerson*). Any instrument that meets that low standard may be defective and challengeable in a motion to quash, but it at least vests the trial court with jurisdiction. *See Studer v. State*, 799 S.W.2d 263, 273 (Tex. Crim. App. 1990) (holding indictment not fundamentally defective where it failed to allege acts constituting recklessness). The requirement that a charging instrument

allege a date within the statute of limitations is a statutory requirement, and the failure to do so does not render the indictment "fundamentally defective." *Burton v. State*, 805 S.W.2d 564, 571 (Tex. App.—Dallas 1991, pet. ref'd) (rejecting challenge, raised for first time on appeal, to indictment that was facially time barred).

In *Smith*, this Court addressed whether a defendant could challenge a defect in a tolling paragraph through a pretrial writ. A tolling paragraph is an allegation the State can make in an indictment showing some exception to the statute of limitations. For instance, in *Smith* the charge was for a misdemeanor committed at least four years before the charge was filed, but the tolling paragraph alleged circumstances that tolled the limitations period. *Smith*, 178 S.W.3d at 800; *see* TEX. CODE CRIM. PROC. arts. 12.02 (two-year limitations for misdemeanors), 12.05 (creating exceptions to limitations period).

Smith filed a pretrial writ alleging the charges against him were limitations barred because the tolling paragraph was inaccurate. This Court held that claim was not cognizable on pretrial writ because the indictment, on its face, was valid and any defects or inaccuracies in the tolling paragraph should be litigated through a motion to quash, even if

those defects meant the charge was time barred. *Smith*, 178 S.W.3d at 799, 804-05.

Although *Smith* dealt with a tolling paragraph, the same logic should apply here. In *Smith* the charge was obviously outside the period of limitations, so without the tolling paragraph the indictment would have been facially invalid. Thus Smith's claim boiled down to challenging the factual support for a facially valid charging instrument.

The appellant was charged with aggravated sexual assault, which has the same limitations period as sexual assault. *See* TEX. CODE CRIM. PROC. art. 12.03(d). Sexual assault has two possible periods of limitations, depending on the facts of the offense and investigation. Ordinarily it has a limitations period of ten years, but it is exempt from limitations, the same as murder, in certain factual situations. TEX. CODE CRIM. PROC. art. 12.01(1)(C), (2)(E).

That is to say, without litigating the facts of the offense itself, a charge for sexual assault is never time barred on its face. The same as murder. No tolling paragraphs or additional language need be alleged in the indictment.

Except for constitutional rights that would bar a trial, the general rule is that pretrial habeas is not an appropriate vehicle to litigate claims

that require factual development. *Ex parte Perry*, 483 S.W.3d 884, 899 (Tex. Crim. App. 2016). Except for *ex post facto* claims, limitations is just another non-constitutional defense. *Proctor v. State*, 967 S.W.2d 840, 844 (Tex. Crim. App. 1998) (limitations defense is forfeitable if not litigated through motion to quash or to jury); *Ex parte Heilman*, 456 S.W.3d 159, 168-69 (Tex. Crim. App. 2015) (same).

When a limitations defense requires the development of facts, as the appellant's does, it does not fall into *Smith's* category of cases where pretrial habeas is appropriate because it is not apparent from the face of the indictment that the charge is time barred. The habeas court considered the facts of appellant's offense and the investigation before making its ruling. That looks like the sort of claim that should be resolved through trial motions and jury arguments—like speedy-trial, collateral-estoppel, and suppression issues—rather than the sort of claim that is litigated through pretrial habeas. *See Ex parte Tamez*, 38 S.W.3d 159, 160-61 (Tex. Crim. App. 2001) (holding that court of appeals should not have addressed facts of case where defendant claimed that part of charged conduct State would prove at trial was outside of limitations period, but indictment, on its face, was not time barred).

The limitations defense is important, and the appellant has a colorable claim. But lots of colorable claims of important defenses are litigated in motions to quash and at trial, many of them successfully, without disruptive interlocutory appeals. This Court should reverse the First Court because the trial court did not abuse its discretion by denying relief on a non-cognizable claim.

Ground One

The First Court erred by holding that a shotgun objection and a complaint about another part of the statute preserved the appellant's appellate argument. This conflicts with this Court's holding in *Resendez*.

The First Court's opinion conflicts with this Court's preservation holdings in *Resendez v. State*, 307 S.W.3d 308 (Tex. Crim. App. 2009). By allowing a shotgun objection to count as a valid objection, the First Court threatens to take jurisprudence back to the bad old days where defendants could sandbag the State and raise surprise complaints on appeal. Which is exactly what happened here. The appellant's argument in the habeas court regarded the interpretation of a legal phrase, but on appeal, when the State could no longer admit evidence, he raised a failure of proof claim.

In *Resendez*, the defendant filed motions to suppress his statements invoking, without discussion, three amendments to the federal constitution, two sections of the Texas constitution, and three articles from the Code of Criminal Procedure, including "the safeguards required by … Article 38.22." *Resendez*, 306 S.W.3d at 310-11. At trial, Resendez asked for his statement to be suppressed because he had not been *Mirandized*. He pointed to the lack of *Miranda* warnings on the recording of his statement as proof. The trial court admitted the statement.

On appeal, Resendez complained the lack of recorded warnings violated Article 38.22 Section 3(a)(2)'s requirements to record *Miranda* warnings. The Fourteenth Court held Resendez's trial-court reference to the recording preserved this complaint, and reversed. *Id.* at 312.

This Court granted review and held the argument was unpreserved. First, this Court noted the motion to suppress did not preserve the complaint because "Article 38.22 contains a number of subsections that could have been applicable," but the appellant's motion did not specify which it was invoking. *Id.* at 313.

Second, this Court held the reference to the recording at the hearing did not preserve the argument. This Court analyzed several of its

then-recent cases and stated a rule: "[A] complaint that could, in isolation, be read to express more than one legal argument will generally not preserve all potentially relevant arguments for appeal. Only when there are clear contextual clues indicating that the party was, in fact, making a particular argument will that argument be preserved." *Id.* at 314. This Court held Resendez's argument at the hearing *could* be read in isolation to have preserved his appellate complaint, but the context of the argument showed he was complaining about something else.

Resendez's analysis applies here. The appellant's habeas petition invoked, without argument or discussion, two constitutional provisions that guarantee almost every constitutional right recognized in a criminal trial, and a statute that is almost 800 words long and contains the limitations period for every felony in Texas, including at least three provisions relating to sexual assault. *Resendez* makes clear that preserved nothing.[1]

The appellant's statement that his "core position" was that "the ten-year statute of limitations does apply" is just like the trial argument

[1] *Resendez* did not use the phrase "shotgun objection," but it applies both there and here: The objections "cite[d] many grounds … without argument and serve[d] only to obscure the specific grounds of the objection." *Johnson v. State*, 263 S.W.3d 287, 290 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd, untimely filed)

in *Resendez*: It could express more than one legal argument. That means a reviewing court must look at the context to determine what argument the party was invoking.

The context makes clear the appellant was arguing the ten-year statute of limitations applied because the appellant was "readily ascertained," thus the 12.01(1)(C)(i) exemption was inapplicable. Just after the "core position" comment defense counsel discussed two cases he had given the habeas court, which "talk[ed] about whether or not his identity is ascertainable, readily ascertainable." (1 RR 18-21). Defense counsel's argument, and the habeas court's ruling, focus exclusively on interpreting the phrase "readily ascertained."[2] (1 RR 21-25).

There is no hint anyone believed the appellant was asking for habeas relief because the State failed to admit the test results. *Resendez* makes clear this complaint was unpreserved.

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[2] The First Court claimed the trial court's comments "indicate that it understood that the focus of the disagreement between the State and appellant … was centered on the third prong of the statutory provision—whether the forensic DNA testing results showed that the biological matter collected did not match the victim or any other person whose identity was readily ascertained." *Edwards*, 608 S.W.3d 334. But "the third prong" has multiple parts. The record shows the trial court focused on only one part, but the complaint on appeal regarded another.

The First Court's statement that the parties were litigating "the third prong" is vague but accurate enough. The First Court's use of this statement to imply the parties were litigating all parts of "the third prong" misrepresents the record.

The First Court admitted the parties "may have been more focused around the meaning of 'readily ascertained,'" but held this was not "dispositive" because of what was raised in the appellant's habeas application. *Edwards*, 608 S.W.3d at 335. Had the application preserved anything, that would have been true. But as *Resendez* shows, it did not.

For this part of its holding, the First Court relied on *Eisenhauer v. State*, 754 S.W.2d 159 (Tex. Crim. App. 1988) and *Cisneros v. State*, 290 S.W.3d 457 (Tex. App.—Houston [14th Dist.] 2009, pet dism'd.).

In *Eisenhauer*, this Court held a motion to suppress invoking, without argument, three amendments to the federal constitution and "the laws and Constitution of the State of Texas" preserved the argument that the Texas constitution had broader protections than the federal constitution. That holding would help the appellant, except it has been overruled *sub silentio*. *See Resendez*, 306 S.W.3d at 313 (unargued citations to multiple laws in motion preserves nothing); *Pena v. State*, 285 S.W.3d 459, 464 (Tex. Crim. App. 2009) (claim that Texas constitution provides greater protection than federal constitution must first be raised in trial court).

Cisneros has a statement that supports the First Court's holding, but it relied on *Eisenhauer* and did not quote the defendant's motion so

it's impossible to tell if its preservation holding was correct. *Cisneros*, 290 S.W.3d at 462-63. The State prevailed on the merits in *Cisneros*, so this Court was never asked to review the preservation holding. This Court granted Cisneros's petition for review but dismissed it as improvidently granted, possibly suggesting this Court intended to review the merits but noticed the matter was unreserved. *See Cisneros v. State*, 353 S.W.3d 871 (Tex. Crim. App. 2011). At any rate, *Cisneros* does not bind this Court, and the First Court erred to rely on it to the degree it caused it to ignore *Resendez*.

Preservation is particularly important for failure-of-proof claims like what the appellant raised on appeal. The record is crystal clear the State has DNA test results that fit the statutory requirements. Had the appellant raised his appellate complaint in the habeas court, the State could have just admitted them. Instead, he sandbagged the State by not raising this argument until the appeal, and the First Court rewarded him with a reversal. That conflicts with the level of preservation this Court requires. This Court should reverse the First Court.

Ground Two

The First Court erred by holding that the State had to admit DNA test results at a pretrial habeas hearing challenging the validity of the charging instrument.

In its substantive holding, the First Court created an evidentiary requirement from nothing. The statutes and case law do not require a specific form of evidence, but the First Court held the State had to admit the actual DNA test results at the hearing, not merely evidence showing the results exist. This requirement has no basis in the statute, and is pointless—is the habeas judge supposed to personally evaluate the results? Moreover, at a pretrial habeas hearing the applicant bears the burden of proof. The First Court did not explain why the State had a burden to produce *any* evidence at this hearing.

In an application for habeas relief, the applicant must prove his claim by a preponderance of the evidence. *Kniatt v. State*, 206 S.W.3d 657 (Tex. Crim. App. 2006). On appeal from pretrial habeas applications, appellate courts must view the record in the light most favorable to the habeas court's ruling and uphold the ruling absent an abuse of discretion. *Ex parte Wheeler*, 203 S.W.3d 317, 324 (Tex. Crim. App. 2006).

Given that standard of review, it is apparent the First Court erred by placing the burden on the State to produce a particular type of evidence. That is, if the burden of proof is on the applicant, and the habeas court denies relief, logically the quality of the State's evidence cannot be a basis for concluding the habeas court abused its discretion.

Although the State did not admit the actual DNA test results—likely because before this case there was no statute or case requiring it to—the offense report the appellant admitted at the hearing supports a finding that this case qualifies for the 12.01(1)(C) exemption:

- "during the investigation of the offense biological material is collected"
    - The complainant was transported from the scene to a hospital where a sexual assault kit was done (2 RR 17)
    - Police requested the sexual assault kit be "examine[d] for semen, foreign fluids/hairs/fibers, any evidence pertaining to a sexual assault to determine DNA for comparison purposes." (2 RR 20)
- "and subjected to forensic DNA testing"
    - Male DNA was recovered from the sexual assault kit (2 RR 31)
- "and the testing results show that the matter does not match the victim"
    - The recovered DNA was male, but the victim was female (*See* 2 RR 14-15 (describing victim as female)

- "or any other person whose identity is readily ascertained"
    - Police ran the DNA results through CODIS (2 RR 24-25).

It's true enough the offense report does not explicitly describe CODIS, but knowledge of CODIS is common in the criminal justice system and can be gleaned from case law. The Combined DNA Index System (CODIS) is a database that stores either *unknown* DNA profiles from crime scenes, or known profiles from certain, mainly convicted, individuals. *See Demerson v. State*, No. 07-18-00020-CR, 2019 WL 1646242, at *2 (Tex. App.—Amarillo Apr. 16, 2019, pet. filed) (mem. op., not designated for publication); *Drewery v. State*, 08-04-00201-CR, 2005 WL 1791630, at *7 (Tex. App.—El Paso July 28, 2005, pet. ref'd)(mem. op., not designated for publication) (explaining that CODIS comprises samples collected from suspected offenders and evidentiary samples, and developed DNA profiles from evidentiary items are entered and compared to known profiles in the database).

If police knew who the DNA came from, they would not have run it through CODIS. The act of running a DNA sample through CODIS is prima facie evidence investigators did not readily ascertain who it

came from. The offense report shows police requested a "CODIS analysis," they later received a "CODIS match confirmation," and they later contacted the complainant, who identified the appellant from a photo array. (2 RR 25-27).

The parties and the habeas court seemed familiar with CODIS. (*See* 1 RR 9-14 (prosecutor explaining identification of appellant as suspect, with no questions from habeas court or defense counsel about what CODIS is), 24 (defense counsel discussing import of "CODIS hit" under State's legal theory)). On this record, the trial court did not abuse its discretion in finding the State's evidence showed during the investigation of the offense biological matter is collected and subjected to forensic DNA testing and the testing results show that the matter does not match the victim or any other person whose identity is readily ascertained.

But did the State even have a burden of proof in this case? The First Court cited no authority for the proposition that the State must prove its case in a pretrial habeas hearing. The general rule is that a habeas applicant has the burden of proof. Viewed through that light, the State did not have a burden to prove the exemption applied, rather the

appellant had a burden to prove it didn't. Rather than disprove the exemption, the appellant admitted the offense report which showed every element necessary for the exemption, and chose to litigate a legal definition.

Stated correctly, the standard of review here should have been: Did the trial court abuse its discretion in holding the appellant failed to prove this case did not fall within the 12.01(1)(C)(i) exemption? Phrased that way the answer is obvious: No.

Even if the State had some burden of proof, the First Court erred by holding it could be met by only one particular kind of evidence. This Court should reverse that decision.

Conclusion

The State asks this Court to reverse the First Court's judgment and reinstate the habeas court's judgment denying relief.

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